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In The

Supreme Court of the United States

October Term, 1991

JANET AMADOR GARCIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THE FIFTH CIRCUIT COURT OF APPEALS WRONGLY INTERPRETED THE MEANING OF THE PHRASE, "RELEASE FROM IMPRISONMENT" IN U.S.S.G. § 4A1.1(e) BY CONSTRUING IT BROADLY, CONTRARY TO RULES OF STATUTORY CONSTRUCTION AND LEGISLATIVE INTENT.

II. EVEN IF THE FIFTH CIRCUIT'S CONSTRUCTION OF U.S.S.G. § 4A1.1(e) IS CORRECT, APPLICATION OF THE GUIDELINE TO THE FACTS OF PETITIONER'S CASE IS UNCONSTITUTIONAL BECAUSE IT VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION GUARANTEED UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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JANET AMADOR GARCIA,

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UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Janet Amador Garcia respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 4, 1991.

OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Janet Amador Garcia*, and numbered Cause No. 90-5581, was entered on June 4, 1991. The opinion is reproduced in the Appendix at 6a-16a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on June 4, 1991. Appendix at 6a-16a. A timely *Petition for Rehearing* was filed in the Fifth Circuit, which was denied on July 16, 1991. Appendix at 17a-18a. This petition is filed within ninety days after the petition for rehearing was denied. SUP. CT. R. 13.1 and 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

In pertinent part, the Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

SENTENCING GUIDELINE INVOLVED

United States Sentencing Guideline § 4A1.1(e) provides in pertinent part that:

> **§ 4A1.1 Criminal History Category.**
>
> The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> * * *

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 2, and 21 U.S.C. § 841(a)(1).

On February 16, 1990, Janet Amador Garcia, Petitioner herein, entered a plea of guilty before the Honorable Edward C. Prado, a United States District Judge for the Western District of Texas, to aiding and abetting the distribution of one ounce of heroin. A Presentence Report was prepared and, in accord with local procedure, objections were duly filed.

At Petitioner's sentencing hearing held May 17, 1990, the trial court found that she had committed the instant offense less than two years after her "release from imprisonment" from her 1983 convictions for obstruction of the mails. See Appendix at 5a. Pursuant to U.S.S.G. § 4A1.1(e), the trial court added two Criminal History points to Petitioner's overall Criminal History score, raising her to a higher sentencing category. *Id.*

At sentencing, it was uncontroverted that, in 1983, Petitioner had been convicted of two counts of obstruction of the mails, petty offenses under 18 U.S.C. § 1701, each of which carried a maximum penalty of six months'

confinement. Appendix at 2a. For her 1983 convictions, Petitioner was sentenced on September 12, 1983, by a United States District judge to two, consecutive six-month terms of confinement. Execution of Petitioner's sentences was suspended, and she was placed on a three-year term of probation.

Two years later, or on September 24, 1985, Petitioner's probation was revoked, and she was ordered to serve twelve months in custody. Appendix at 4a. Because Petitioner was pregnant at the time of her revocation hearing, the district judge stayed her surrender to federal custody until such time as her child was born. *Id.* Accordingly, Petitioner did not begin service of her federal sentences for obstruction of the mails until January of 1986. *Id.*

On October 27, 1986, Petitioner was released from the Federal Correctional Institution at Fort Worth, Texas, to a halfway house in San Antonio, Texas. Appendix at 2a. Approximately one month later, or on November 24, 1986, Petitioner tested positive for drug use. *Id.* As a consequence of her drug use, Petitioner was removed from the halfway house and placed in the Comal County Jail – a setting of higher security – by her custodian, the Bureau of Prisons. *Id.*

Petitioner was never returned to prison. *Id.* Instead, on January 2, 1987, Petitioner discharged her federal sentence during her confinement in the Comal County Jail. *Id.* The instant offense, for which Petitioner presently stands convicted, occurred on November 22, 1988 – more than two years after her release from the Federal Correctional Institution at Fort Worth, but less than two years

after she discharged her sentence in the Comal County Jail.

REASONS FOR GRANTING THE WRIT

Section 4A1.1(e) provides that 2 points are to be added to a defendant's criminal history score:

> . . . if the defendant committed the instant offense less than two years after *release from imprisonment* on a sentence counted under (a) or (b) or while in imprisonment or escape status on such sentence. . . . (Emphasis added.)

Whether two points should have been added to Petitioner's Criminal History score by the district court depends upon the very narrow issue of how the phrase, "release from imprisonment," is to be construed. In the Fifth Circuit, Petitioner contended that she was on mandatory release status following her release from imprisonment on October 27, 1986, and continued on mandatory release until January 2, 1987, when she discharged her sentence. Under a strict construction of the language of U.S.S.G. § 4A1.1(e), Petitioner argued that the phrase "release from imprisonment" means precisely that, and is distinguishable from the concept of discharging a criminal sentence in its entirety.

The Fifth Circuit declined to construe the scope of U.S.S.G. § 4A1.1(e). Appendix at 14a. Instead, relying on a Background Commentary to U.S.S.G. § 4A1.1, the panel concluded that a district court could consider convictions in the federal system, the fifty state systems, the District of Columbia, territories, and foreign, tribal, and military

courts when determining the *number* of prior convictions. *Id.* The Background Commentary, though useful in determining what constitutes a prior conviction for purposes of determining Criminal History under U.S.S.G. § 4A1.1(a)(b) and (c), in no way illuminates what the phrase, "release from imprisonment," means from such a sentence under U.S.S.G. § 4A1.1(e).

Even if the Fifth Circuit's construction of the phrase, "release from imprisonment," is correct, the application of U.S.S.G. § 4A1.1(e) was unconstitutional as to Petitioner, in violation of her right to Equal Protection under the law. The question of whether a Federal Sentencing Guideline, though neutral on its face, can be applied in an unconstitutionally discriminatory way is an important question of federal law which has not been, but should be, settled by this Court. SUP. CT. R. 10(c).

I. THE FIFTH CIRCUIT COURT OF APPEALS WRONGLY INTERPRETED THE MEANING OF THE PHRASE, "RELEASE FROM IMPRISONMENT" IN U.S.S.G. § 4A1.1(e) BY CONSTRUING IT BROADLY, CONTRARY TO RULES OF STATUTORY CONSTRUCTION AND LEGISLATIVE.

In order to determine how U.S.S.G. § 4A1.1(e) should be applied to the facts of Petitioner's case, it is first necessary to understand the nature of Petitioner's 1983 sentence and its operation.

A.

The Nature Of Petitioner's 1983 Sentence

On September 12, 1983, Petitioner was sentenced in federal court for two counts of obstruction of the mails. Petitioner was sentenced to two six-month terms of confinement for her convictions, those sentences to run consecutively to each other, for a total effective sentence of twelve months' confinement. Petitioner's sentences were suspended, however, and she was placed on probation for a period of three years. In September of 1985, Petitioner's probation for her petty offense convictions was revoked. Petitioner surrendered to federal custody in January of 1986 to begin service of her twelve-month sentence.

In September of 1985, at the time petitioner's 1983 probation was revoked, the Sentencing Guidelines were not in effect. Petitioner's sentence was governed, instead, by a number of statutes which have since been repealed. It is necessary to examine these statutes in order to understand how Petitioner's prior sentence operated in fact.

1. Because Petitioner's Aggregate Sentence Did Not Exceed One Year, She Was Ineligible For Parole.

The Fifth Circuit concluded in error that, after her 1985 revocation, Petitioner was ultimately released on parole. Appendix at 14a. Because Petitioner's aggregate sentence did not exceed one year, she was *never* eligible

for parole and, accordingly, was never under the jurisdiction of the United States Parole Commission. *See* 18 U.S.C. § 4205(a).[1] Section 4205(a) provided in pertinent part that:

> **(a)** Whenever confined and serving a definite term or terms of *more than one year, a prisoner shall be eligible for release on parole* after serving one-third of such term or terms . . . except as otherwise provided by law. (Emphasis added.)

Because Petitioner was ineligible for parole, her release from her twelve-month sentence of imprisonment was governed by 18 U.S.C. § 4205(f) which provided in pertinent part that:

> **(f)** Any prisoner sentenced to imprisonment for a term or terms of not less than six months but not more than one year ***shall be released at the expiration of such sentence less good time reductions provided by law*** . . . (Emphasis added.)

Thus, under the statutes then in effect, Petitioner was obligated to serve her twelve-month sentence to expiration, less any good time reductions she may have earned.

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[1] 18 U.S.C. § 4205 was repealed on October 12, 1984, but remained in effect for five years after repeal and was applicable to individuals whose offense occurred prior to November 1, 1987.

2. Petitioner Was Entitled To Sixty Days' Statutory Good Time Credit On Her Sentence Of Confinement.

Prior to the enactment of the Sentencing Guidelines, good time credits were computed according to 18 U.S.C. § 4161.[2] Under § 4161:

> Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, ***shall be entitled to a deduction from the term of his sentence*** beginning with the day on which the sentence commences to run, as follows:
>
> Five days for each month, if the sentence is not less than six months and not more than one year.
>
> * * *
>
> When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed. (Emphasis added.)

Under § 4161, Petitioner was entitled to a total of sixty days' statutory good time, which would result in a two-month reduction of her overall sentence of confinement.

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[2] 18 U.S.C. § 4161 was repealed on October 12, 1984, but remained in effect for five years and was applicable to individuals whose offense was committed prior to November 1, 1987.

3. Statutory Good Time Creates A Constitutionally Recognized Liberty Interest.

Good time credits earned under § 4161 constitute a liberty interest, the deprivation of which triggers Constitutional protection. *See Brown v. Smith*, 828 F.2d 1493, 1494 (10th Cir. 1987); *Thompson v. Capps*, 626 F.2d 389, 392 (5th Cir. 1980), *citing*, *Keenan v. Bennett*, 613 F.2d 127 (5th Cir. 1980). *See also Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974) (a prisoner has a "liberty" interest in State-created good time which entitles him to certain due process protections). While statutory good time credits do not reduce the term of the overall sentence imposed, good time credits do reduce "the time of confinement," and enable the prisoner to spend the latter part of his sentence "outside the prison walls". *See, e.g., Bell v. Putman*, 548 F.2d 749, 751 (8th Cir. 1977). *See also Coronado v. United States Board of Paroles*, 303 F.Supp. 399, 401 (S.D. Tex. 1969); *Kelly v. Goodwyn*, 239 F.Supp. 269, 271 (E.D.Tex. 1975); *Lopez v. Madigan*, 179 F.Supp. 742, 743 (N.D.Cal. 1959). As noted in *Bell v. Putman*:

> In the federal penal system, good time operates to *reduce the length of a prisoner's incarceration*; it does not accelerate the termination of post-release supervision for a parolee or a prisoner who has reached his mandatory release date.

Id., 548 F.2d at 751 (emphasis added).

As recognized by this Court in *Wolff v. McDonnell*, the deprivation of good time is unquestionably a matter of

considerable importance. *Id.*, 94 S.Ct. at 2977. Accordingly, this Court held that, before an individual may be deprived of a protected liberty interest in good time credits, due process requires that the individual be afforded certain procedural protections. *Id.*, 94 S.Ct. at 2975. Under *Wolff*, before an individual's good time credits can be forfeited, the individual must receive: 1) advance written notice of the disciplinary charges; 2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and, 3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. *Id.*, 94 S.Ct. at 2978-2980.

Although the Fifth Circuit concluded in error that Petitioner's parole had been revoked, Appendix at 14a, there was no evidence to suggest that a revocation hearing was held in regard to her earned good time credits.

4) The Nature Of Petitioner's 1983 Sentence.

According to Bureau of Prisons' records, Petitioner was mandatorily released from the Federal Correctional Institution at Fort Worth, Texas, on October 27, 1986 – approximately 10 months after she commenced service of that sentence. From this fact, it must be inferred that Petitioner did, indeed, earn her 60 days' statutory good time, which became a vested liberty interest, and which could not be taken from her absent a disciplinary hearing comporting with the minimum procedures set forth in *Wolff v. McDonnell*. Although the Bureau of Prisons first placed Petitioner in a halfway house in San Antonio and,

later, in the Comal County Jail, from which she ultimately discharged her sentence, Petitioner was never returned to prison. Moreover, there is nothing in the record to suggest that Petitioner's good time credits were forfeited at a disciplinary proceeding.

B.

There Is A Difference Between A Sentence, And The Period Of Incarceration Under The Sentence

As the Fifth Circuit, itself, has recognized, "[a] sentence is not the equivalent of the period of incarceration under the sentence." *United States v. Castro-Perpia*, 932 F.2d 364, 366 (5th Cir. 1991). In Petitioner's case, the critical distinction is that, although the Attorney General, through the Bureau of Prisons, had the authority to *supervise* Petitioner until her sentence expired on January 2, 1987, the good time credits she earned while in custody *mandated her release from prison* on October 27, 1986. As Petitioner's good time credits were never forfeited, she did, in fact, discharge her sentence outside the prison walls. *Lopez v. Madigan, supra*, 179 F.Supp. at p. 743.

Nor should the fact that Petitioner discharged her sentence from the Comal County Jail compel a finding that she was "imprisoned" for purposes of U.S.S.G. § 4A1.1(e) – particularly as Petitioner's good time credits were never forfeited. Under 18 U.S.C. § 4002, the Director of the Bureau of Prisons may contract with county jails to house "persons held under authority of any enactment of Congress." Case authority suggests that jails do not constitute federal penal or correctional institutions. *See*

United States v. Jimenez, 454 F.Supp. 610, 611 (M.D.Tenn. 1978).

In *Jimenez*, the district court relied, *inter alia*, upon the decision of this Court in *Logue v. United States*, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973), in which it was held that the United States was not liable under the Federal Tort Claims Act for the negligence of county jail employees which caused the death of a federal prisoner confined in a county jail. 454 F.Supp. at 612. Although in *Logue*, the federal prisoner was housed in a county jail pursuant to a contract with the Bureau of Prisons, the county jail was not deemed to be a federal agency or institution for purposes of the FTCA. *Id.*

The district court in *Jimenez* also relied on a decision by the Fifth Circuit in *Henderson v. Thrower*, 497 F.2d 125 (5th Cir. 1974), which held that a federal prisoner, confined in a city jail pursuant to a contract with the Bureau of Prisons, could sue local jail officials and employees under 42 U.S.C. § 1983. *Id.* The Fifth Circuit held that the acts of the jail staff were "under color of *state* law" in spite of the contract. *Id.* It was the view of the *Jiminez* court that, had the local jail been considered a federal institution and the jailkeepers federal employees, it is doubtful that the § 1983 suit would have been allowed. *Id.*

C.

U.S.S.G. § 4A1.1(e) Should Be Strictly Construed

To be sure, the Sentencing Guidelines are subject to the rules of statutory construction. *United States v. Rocha*, 916 F.2d 219, 243 (5th Cir. 1990), *citing*, *United States v.*

Vickers, 891 F.2d 86, 88 (5th Cir. 1989). Ordinarily, as with other statutes, the clear and unambiguous language of the Guidelines will be followed if there is no discernible manifestation of contrary intent. *Id.* Elsewhere, it is said that the Sentencing Guidelines are penal in nature and, as such, must be strictly construed. *United States v. Khang*, 904 F.2d 1219, 1222 (8th Cir. 1990).

Under § 4A1.1(e), 2 points are added to a defendant's Criminal History score if the instant offense was committed less than two years after "release from imprisonment" on a sentence counted under § 4A1.1(a) or (b); or, if the instant offense was committed while the defendant was on imprisonment or escape status on such a sentence. The language of § 4A1.1(e) is unambiguous on its face and, accordingly, must be regarded as conclusive absent a clearly expressed legislative intent to the contrary. *See United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). *See also Crandon v. United States*, ___ U.S. ___, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text"); and *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 1504 n.3, 103 L.Ed.2d 891 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute.").

Where a criminal statute is ambiguous, however, the statute must be construed under the rule of lenity. *United States v. Tonry*, 837 F.2d 1281, 1283 (5th Cir. 1988); *United States v. Cruz*, 805 F.2d 1464, 1473 (11th Cir. 1986). Thus, where there are two rational interpretations of a statute,

one harsher than the other, the court may choose the harsher result only when the legislature has spoken in clear and definite language. *United States v. Tonry, supra,* 837 F.2d at 1284, *citing, McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292 (1987).

Under the plain language of § 4A1.1(e), the phrase, "release from imprisonment" must be construed to mean exactly that – the date from which the defendant was actually released from prison – as opposed to when the sentence, itself, was ultimately discharged.

In addition to the general rules of statutory construction, support for the more narrow construction of § 4A1.1(e) urged by Petitioner is found in U.S.S.G. § 4A1.2(k)(2), which provides that:

> *Revocation* of probation, parole, supervised release, special parole, or mandatory release *may affect the points for § 4A1.1(e) in respect to the recency of the last release from confinement.* It may also affect the time period under which certain sentences are counted as provided in § 4A1.2(e)(1). (Emphasis added.)

Under § 4A1.2(k)(2), the time which a defendant spends outside of prison, under any form of conditional release, does not appear to count in determining the recency of the last release from confinement under § 4A1.1(e) unless that conditional release is *revoked* within two years of the instant offense.

For example, if a defendant was released from imprisonment on a sentence counted under § 4A1.1(a) or (b) three years before committing the instant offense, that release would be too old for § 4A1.1(e) to apply. *See,*

Hutchinson & Yellen, *Federal Sentencing Law and Practice, Criminal Practice Series, annotated Sentencing Guidelines*, p. 311 (West, 1989). If, however, within two years of committing the instant offense, the defendant served some additional prison time *for a revocation* of his conditional release in connection with the prior offense, would § 4A1.1(e) then apply? *Id.* According to the commentators, the answer is unclear. *Id.*

Because Petitioner's mandatory release was never revoked, the question of how § 4A1.2(k)(2) should be applied in her case does not arise. Without question, Petitioner was released from federal prison on October 27, 1986 – more than two years before she committed the instant offense. Under the plain and unambiguous language of U.S.S.G. § 4A1.1(e), and the facts of Petitioner's case, two criminal history points should not have been added to her Criminal History score. If, however, this Court should conclude that the phrase, "release from imprisonment," in U.S.S.G. § 4A1.1(e) is ambiguous, then under the rule of lenity, the same result should obtain.

II. EVEN IF THE FIFTH CIRCUIT'S CONSTRUCTION OF U.S.S.G. § 4A1.1(e) IS CORRECT, APPLICATION OF THE GUIDELINE TO THE FACTS OF PETITIONER'S PARTICULAR CASE IS UNCONSTITUTIONAL BECAUSE IT VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION GUARANTEED UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

While U.S.S.G. § 4A1.1(e) is neutral on its face, its application to Petitioner's case violated her right to Equal

Protection under the Fifth Amendment to the United States Constitution in that it had a disproportionate impact upon her related solely to her gender. Even if the Fifth Circuit's construction of § 4A1.1(e) is correct, its availability for use under the facts of Petitioner's case comes into play only because Petitioner's surrender on that sentence was stayed due to her pregnancy. But for Petitioner's pregnancy, she would have been remanded to custody immediately, and she would have fully discharged her one-year sentence in September of 1986 – unquestionably more than two years before she committed the instant offense.

The Fifth Circuit, without resort to any authority, concluded that Petitioner's criminal history score was not enhanced because of her gender. Appendix at 15a. Rather, the panel concluded, Petitioner's sentence was enhanced because of "her *crime* within the specified time frame." *Id.* (emphasis added). The panel further concluded that the delay in Petitioner's *sentencing* was not discrimination, nor was she punished on the basis of the fortuity of gender. *Id.*

The Fifth Circuit's analysis of Petitioner's argument is unsound. The application of U.S.S.G. § 4A1.1(e) is not based upon the timing of the commission of the earlier prior offense but, rather, upon the timing of an individuals release from imprisonment on the prior offense. Despite the conclusion of the panel, Petitioner never suggested that either her original sentencing, or her revocation of probation, was delayed because of her pregnancy. Rather, Petitioner argued that her surrender to custody

was delayed as a consequence of her pregnancy. As Petitioner could not begin to earn time credits on her sentence until she surrendered to federal custody, 18 U.S.C. § 3585(a), Petitioner's release on her sentence of imprisonment was delayed as a direct consequence of her pregnancy.

To be sure, this Court has stated that gender-based discrimination is unconstitutional absent a showing that the classification substantially furthers an important governmental interest. *Kirchberg v. Feenstra*, 450 U.S. 455, 459-60, 101 S.Ct. 1195, 1198, 67 L.Ed.2d 428 (1981). Elsewhere, it is said that gender is to be treated as quasi-suspect classification that requires intensified, though not "strict" scrutiny under the Equal Protection Clause. *Orr v. Orr*, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306 (1979).

Constitutional guarantees tolerate no differences based exclusively on sex for those persons similarly situated. *Hobson v. Pow*, 434 F.Supp. 362, 366 (D.C.Ala. 1977). Thus, equal protection is violated when different punishments for offenses are grounded merely on the basis of gender. *Id.* For example, it was held that application of harsher, federal parole criteria to male offenders confined in federal prisons discriminated against such male offenders in violation of equal protection where female offenders were considered for parole under the more lenient parole criteria of the District of Columbia, regardless of their place of confinement. *Walker v. Luther*, 644 F.Supp. 76, *aff'd.*, 830 F.2d 1208 (2nd Cir. 1987). In Petitioner's case, it is simply because of the fortuity of gender that she is more harshly punished under U.S.S.G. § 4A1.1(e).

III. DETERMINATION OF THE CONSTRUCTION OF U.S.S.G. § 4A1.1(e), AND ITS CONSTITUTIONALITY AS APPLIED, IS IMPORTANT TO THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE.

Recently, this court twice addressed the scope or ambit of criminal statutes, concluding in each instance that strict construction was required, and that the rule of lenity applied. *Crandon v. United States, supra, Hughey v. United States,* 495 U.S. ___, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). One of the articulated purposes for the enactment of the Federal Sentencing Guidelines is to provide sentencing uniformity among defendants with similar records who have been found guilty of similar criminal conduct. 28 U.S.C. § 991(b)(1)(B). If unwarranted sentencing disparities are to be avoided under the Federal Sentencing Guidelines, then it is important that this Court resolve any question as to the construction and scope of particular Guidelines as the need for construction arises. Likewise, the Federal Sentencing Guidelines must be scrutinized for discriminatory application. Only in this way can the goal of fairness in the implementation of federal criminal sentences by achieved.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant certiorari to review the decision of the court of appeals in this case.

Respectfully submitted,

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Counsel of Record for Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

THE UNITED STATES OF AMERICA,	)	CRIMINAL ACTION
PLAINTIFF,	)	SA-89-CR-105 (1)(2)
VS.	)	
JANET AMADOR GARCIA (1) RAUL GARCIA (2)	)	SAN ANTONIO, TEXAS
	)	MAY 17, 1990
DEFENDANT.	)	11:37 A.M.
.....	)	

VOLUME VII OF VII

SENTENCING

BEFORE THE HONORABLE
EDWARD C. PRADO, JUDGE
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT.

APPEARANCES FOR:

THE GOVERNMENT:	MR. STEVEN SNYDER, AUSA U.S. ATTORNEY'S OFFICE 727 E. DURANGO BLVD., A-601 SAN ANTONIO, TEXAS 78206
THE DEFENDANT (1):	MR. STEVE HILBIG 2933 E. SOUTHCROSS BLVD. SAN ANTONIO, TEXAS 78223
THE DEFENDANT (2):	MS. NANCY BAROHN 442 DWYER AVENUE SAN ANTONIO, TEXAS 78204

* * *

On paragraph 35, Your Honor, we object to the addition of two points to her criminal history for committing the instant offense less than two years after her release from [p. 101] imprisonment on her sentence for obstruction of the mail.

I talked to Mrs., when I got the report, neither Mrs. Garcia nor I anticipated that this would be in the report and I asked her when she was released from prison on her – she was convicted of two petty offenses in Judge Garcia's Court and received two six month sentences consecutive to each other. She indicated to me that she recalled being released from prison in late October of 1986.

I called the Bureau of Prisons yesterday and one of the things that I wanted to adduce at this hearing, Your Honor, were the Bureau of Prisons files on Mrs. Garcia which I have not had the opportunity to subpoena. Maybe Mr. Amey has them but I – he does? Okay, good – because all they had were computer, was computer information, but at least the information that I was able to learn from the Bureau of Prisons was that she was actually released from her imprisonment at FCI, Fort Worth, on October the 27th of 1988. She was never returned to prison.

I understand that she went to a halfway house in San Antonio for approximately one month at the end of her sentence, and apparently, at least according to the Bureau of Prisons what they indicated to me – and I have not seen the file – is that she tested positive for heroin while at the halfway house, and I'm not sure what the records reflect on this, but if Mr. Amey has the file, then maybe I can examine [p. 102] it. That she then spent the tail end of her sentence in the Comal County Jail and so was discharged from Comal on January the 2nd, 1987, and so the question I have – and I have not seen the file so I really can't tell the Court precisely what happened – but I'm not

sure whether she actually had a revocation hearing at that point or if they just simply put her in Comal to let her discharge out. I don't know.

But, without question, she did not return to prison and so I think that that's an issue that we're prepared to litigate.

THE COURT: I don't think she was ever considered released from custody.

MS. BAROHN: Well, she was released from – I'm not sure.

THE COURT: A halfway house can be considered part of the custody and usually when they release someone from the institution, they put them in a halfway house, they're still considered in custody. Is that right, Mr. Amey?

PROBATION OFFICER: That's correct and it's correct in this instance, Your Honor.

MR. SNYDER: And I would note the mere fact that they put her in Comal County Jail rather than send her back to Fort Worth is at the convenience of the Bureau of Prisons, and they are not worried about formal definitions on what prison is or is not. The point of it is is [sic] that she was in the custody of [p. 103] the Attorney General of the United States in confinement and that is what that enhanced two points is looking to and she fits that definition.

MS. BAROHN: We have some additional arguments on this point, Your Honor.

Number one, is I believe that what the guideline says is that if the offense is committed less than two years after release from imprisonment on a sentence. I think there's a distinction between imprisonment on a sentence and discharge from a sentence. Surely, she was under the

custody of the Attorney General until her sentence was discharged. Certainly, additionally, Your Honor, Mrs. Garcia would advise the Court that since this is a criminal statute that it must be strictly construed and all ambiguities resolved in favor of lenity.

Additionally, Your Honor, just in terms of, you know, I just ask the Court to sort of consider as well, the purpose of the two point enhancement and I think what the purpose of it is is [sic] to punish an individual for recidivism. That if they've committed an offense less than two years after imprisonment, then it shows, you know, a prompt return to criminal conduct.

In Mrs. Garcia's case, the facts are a little bit unfortunate because she was sentenced, in fact, in 1985 by Judge Garcia but as a result of her pregnancy, Judge Garcia permitted her to, stayed her reporting date until 1986 after [p. 104] she had her children, and so had she not been pregnant, of course, she would have gone immediately to prison and would have been – yes?

(Transcriber's Note: Tape Malfunction.)

MS. BAROHN: I'm not sure where I was but what I'm suggesting is that but for Mrs. Garcia's pregnancy, she certainly would have finished her sentence well under, well, less than two years before the commission of the instant offense, and so simply if we consider the policy reasons behind the two level enhancement, it seems to me that in point of fact, but for Mrs. Garcia's pregnancy, the enhancement would not have applied in her case and, for that reason, Your Honor, I think that it really is philosophically, perhaps, and theoretically inappropriate to raise her level, her criminal history by two points simply as a result of a physical condition and simply as the result of the courtesy of Judge Garcia. Many judges would not have afforded her that courtesy. But inasmuch as he did, it is now sort of being used to her detriment.

Of course, the two point enhancement changes her criminal history category and so has a substantial impact upon her guidelines, and so we're real concerned about it, Your Honor, and so I'm sure if the Court wants to rule now. I would appreciate it if the Court would at least take it under advisement. I don't think that these guidelines must be [p. 105] applied in such a mechanistic manner that the sense and the purpose of the guideline is neglected or forgotten.

THE COURT: I think that the guidelines are clear enough where I think that it does apply in this case so that objection, Ms. Barohn, will be overruled.

MS. BAROHN: May I have a moment, Your Honor?

THE COURT: (No Audible Response.)

MS. BAROHN: Just simply so that the record will reflect all of our objections, Your Honor, we believe that Mrs. Garcia's total criminal history points should be 3 rather than 5 based upon our objections in paragraph number 35.

THE COURT: That's fine.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-5580
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JANET AMADOR GARCIA,

Defendant-Appellant.

* * * * * * * * *

Consolidated with
No. 90-5581
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL GARCIA,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(SA-89-CR-105(1) & SA-89-CR-105-2)

(June 4, 1991)

Before CLARK, Chief Judge, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:*

Raul Garcia (Raul) and Janet Amador Garcia (Janet) challenge the district court's ruling on their motion to suppress evidence. Individually, they challenge the district court's computation of their criminal history score. We affirm.

I

Defendants agreed to this factual basis for their guilty pleas.

Prior to November 1988, two undercover special agents of the Drug Enforcement Agency had purchased quantities of marijuana and cocaine from Rudy Amador (Rudy), Janet's brother, in Pontiac, Michigan. The agents began negotiating with Rudy for the purchase of heroin and a larger quantity of marijuana in Texas. Rudy stated he could obtain the heroin from his sister, Janet, in San Antonio.

On November 19, 1988, the agents traveled to San Antonio pursuant to an agreement with Rudy. There, Rudy stated he could obtain an ounce of black tar heroin from Janet for approximately $6000. The agents agreed. Rudy gave the agents the Garcias' home telephone number in San Antonio. On November 22, one of the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

agents telephoned the number and spoke to a woman who identified herself as Janet. She stated that she was aware of the proposed transaction and that everything was set. In a later telephone conversation, she told the agent that Rudy had left her residence and was on the way to see the agents with "the little thing." Rudy met the agents in their hotel room. The agents exchanged $6000 for a plastic baggie containing a black gummy substance, later identified as 28.8 grams of 72 percent heroin. At the meeting, Rudy stated that Janet had cashed a check to pay for this particular heroin. Later investigation revealed that she had cashed a check for $4500 the day before this transaction.

On April 20, 1989, agents executed federal search warrants on the Garcias' residence in San Antonio and on their property in MacDona, Texas. At the San Antonio residence, the agents seized a blender, sifters and funnels containing heroin residue, along with numerous small balloons of the type used in packaging heroin. At a mobile home on the MacDona property, the agents again seized a blender, scales and balloons, along with cutting agents and two small packages wrapped in duct tape which contained approximately 113 grams of a powder containing heroin. They also seized a plate containing approximately 430.8 grams of a powder containing heroin. Fingerprints on the plate were identified as Raul's. When serving the warrant in MacDona, the agents saw a Hispanic male flee into the woods. Janet identified this man as Raul.

Raul and Janet were charged in a three-count indictment. Count one charged them both with conspiracy to possess with intent to distribute heroin, in violation of 21

U.S.C. §§ 841(a)(1) and 846. Count two charged Janet with aiding and abetting Rudy in the distribution of heroin, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count three charged Raul and Janet with possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1).

Raul entered a conditional plea of guilty to count three. Janet entered a conditional plea of guilty to count two. The remaining counts against them were dismissed pursuant to their plea agreement. Raul was sentenced to 96 months imprisonment, five years supervised release, and a $50 special assessment. Janet was sentenced to 78 months imprisonment, five years supervised release, and a $50 special assessment. Their appeals have been consolidated.

II

A

Under the conditional plea, Raul and Janet challenge the sufficiency of the affidavit upon which the search warrant was based. The ten-page affidavit consists of three parts: the affiant-agent's training and experience; information supplied by confidential informants and obtained through the investigation of Rudy; and independent police investigation which corroborated that information. Those facts identified by the affiant as establishing probable cause necessary for the issuance of a search warrant for the Garcias' properties are set out in the appendix, *infra*.

With *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1982), the Supreme Court reaffirmed that the "totality-of-the-circumstances analysis

that traditionally has informed probable-cause determinations" applies to scrutiny of affidavits upon which a magistrate relies when issuing a search warrant. The Court stated:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 238-39, 103 S.Ct. 2332 (citations omitted). When reviewing a warrant, we consider the informant's veracity, reliability and basis of knowledge. A deficiency in one may be compensated for by a strong showing as to another, or by some other indicia of reliability. *United States v. Jackson*, 818 F.2d 345, 348 (5th Cir. 1987).

Gates requires that "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331 (citation omitted). However, our review is independent of the district court. The "clearly erroneous" standard of review does not control. *Jackson*, 818 F.2d at 348.

This affidavit is not "bare bones." The critical information supplied by the confidential informants was based upon their personal knowledge and observation.

CI-1 personally observed Raul[1] distribute 3 ounces of heroin to an individual at the individual's residence in San Antonio. CI-2 had personally purchased 1/8 to 1/4 ounce distributions of heroin from Raul at the Garcia residence on approximately 20 occasions. CI-3 had personally exchanged stolen property for heroin on several occasions at defendants' MacDona ranch. Each of the informants also recounted personal details about defendants, their heroin-fencing business, and the use of their ranch in MacDona. Furthermore, the affidavit contained the information concerning the investigation of Rudy, largely recounted above as the factual basis underlying their plea of guilt.

The Supreme Court has expressed its continuing concern that "wholly conclusory statement[s]" and "mere ratification of the bare conclusions of others" not form the basis for issuing a warrant upon probable cause. *Illinois v. Gates*, 462 U.S. at 239, 103 S.Ct. at 2332-33. Statements such as these based on personal knowledge and independent police investigation clearly allay any such concern. *See United States v. Hyde*, 574 F.2d 856, 863 (5th Cir. 1978).

Defendants also attack the reliability of the information obtained from the informants and gathered from the investigation of Rudy. The affidavit sets forth the credentials of each informant. All were first-time informants.

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[1] Defendants emphasize that the affidavit states that CI-1 observed "*Paul* Garcia" make this distribution. In context, it is clear that this is a typographical error referring to *Raul* Garcia.

Two were convicted felons; the other was paid. The affiant's observation of CI-1's methods of collecting information were noted, which she stated were "reliable and trustworthy." The affiant also indicated the extent to which other information was corroborated. Defendants' challenge to credibility is based on selecting only portions of the affidavit. It is insufficient to overcome the great deference due the magistrate's determination of probable cause.

Defendants also challenge the reliability of statements made by Rudy. This information was wholly derived from police investigation. Rudy's "representations" were confirmed by telephone conversations between the agents and Janet, and by the concluded heroin transaction originating from their San Antonio residence. The affidavit thus exhibits both a basis of knowledge and reliability. Defendants argue that the magistrate should have conducted a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), regarding this information. However, they made no "substantial showing" that the affidavit contained false or recklessly indifferent statements.

Defendants contend the information in the affidavit was eight months old and "stale." However, the information provided by CI-3 indicated defendants were presently distributing heroin. The investigation of Rudy concluded with a sale five months before the warrant issued. In any event, problems of staleness involve, not a mechanical counting of days, but a consideration of the nature of the criminal activity and the type of evidence sought. *United States v. Freeman*, 685 F.2d 942, 951 (5th Cir. 1982). The information in the affidavit established that

defendants were engaged in an ongoing heroin distribution enterprise from the properties described. The magistrate could reasonably have concluded that narcotics would be found on the premises. *See id.; United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir.), *cert. denied sub nom. Hoskins v. United States*, 469 U.S. 1073 (1984).

Defendants also challenge corroboration. The affidavit showed Janet had one arrest for possession of heroin, and Raul had three arrests and one conviction for possession of heroin. It also confirmed the ownership and description of the property and cars as recounted by the informants and as ascertained during the investigation of Rudy. Defendants argue that the agents should have conducted surveillance to confirm that they were currently involved in drug trafficking. This was not required. *See United States v. Phillips*, 727 F.2d 392, 399-400 (5th Cir. 1984). The investigation made supported the information received, and the informants' statements were consistent. This is sufficient. *United States v. Farese*, 612 F.2d 1376, 1379 (5th Cir.), *cert. denied*, 447 U.S. 925 (1980).

The affidavit supports the magistrate's determination of probable cause.

Janet challenges the computation of her criminal history score. The district court enhanced her criminal history score by two points upon finding that she committed the offense of conviction less than two years after release from imprisonment. *See* U.S.S.G. § 4A1.1(e). The district court based this finding on the Pre-Sentence Report (PSR), which noted that she was convicted on two counts

of obstruction of mail in September of 1983, and sentenced to two consecutive six-month sentences, suspended in favor of three years probation. Her probation was later revoked, and she was ordered to serve her sentences. She was paroled to a halfway house, which also resulted in her later return to prison. She was then released from custody on January 2, 1987. Her conviction here for aiding and abetting the distribution of heroin occurred on November 22, 1988.

Janet makes a lengthy statutory analysis to explain "good time" credits, parole and probation under the sentencing statutes in place prior to the Sentencing Guidelines. She then asserts she was released from federal penitentiary to a halfway house on October 27, 1986, which, she argues, should be the date from which to calculate the application of this guideline. However, this release was revoked, and she was returned to a county jail, where she was at all times under the control and supervision of federal authorities. Her release from jail on January 2, 1987, placed her within the ambit of U.S.S.G. § 4A1.1(e) when she committed her crime less than two years later. Furthermore, nothing in this provision indicates that the "imprisonment" must be in a federal, as opposed to state, facility to permit scoring under the Guidelines' criminal history computation. "Prior convictions may represent convictions in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts." U.S.S.G. § 4A1.1, comment (backg'd).

Janet also argues that this section, as applied, violates her rights to equal protection. *See* U.S. CONST. amend. XIV

§ 1. Apparently she would have begun serving her sentence earlier but for her pregnancy, which caused the judge to delay her incarceration. From this, she argues that § 4A1.1(e) as applied disproportionately impacts her based on gender. Her criminal history score was not enhanced because of her gender. It was enhanced because of her crime within the specified time frame. The delay in sentencing because of pregnancy was not discrimination, nor has she been punished on the basis of "the fortuity of gender."

C

Raul challenges the computation of his criminal history score. The PSR listed four prior criminal convictions: (1) burglary of a tire store in Bexar County; (2) possession of a sawed-off shotgun in Bexar County: (3) burglary of a habitation in Wilson County; and (4) possession of heroin in Bexar County. Raul was arrested for burglarizing the tire store on March 6, 1980, and for possession of the shotgun on May 26, 1980. He was sentenced for both offenses on September 29, 1980. He was arrested for burglary of a habitation on the same day as his arrest for possession of a shotgun, but was not sentenced until October 6, 1980.

Based on these facts, the PSR consolidated the burglary of the tire shop and the weapons possession convictions because they were consolidated for trial or sentencing. *See* U.S.S.G. § 4A1.2(a)(2), and comment (n.3). He received three criminal history points for these two

offenses, another three points for the burglary of a habitation, and three more points for the heroin possession conviction.

Raul argues that the burglary of the habitation should have also been consolidated, because he stole the sawed-off shotgun from the habitation he burglarized. He argues that the two offenses thus "occurred on a single occasion." *Id.*

The district court apparently accepted his representations. However, he was in possession of the weapon the day of his arrest in Bexar County, which was not the day of the burglary in Wilson County. Accordingly, these offenses did not occur "on a single occasion." The district court correctly scored Raul's criminal history category.

III

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-5580

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JANET AMADOR GARCIA,

Defendant-Appellant.

No. 90-5581

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAUL GARCIA,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

ON PETITIONS FOR REHEARING
(JULY 16, 1991)

Before CLARK, Chief Judge, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered causes be and the same are hereby denied..

ENTERED FOR THE COURT:

/s/ Charles Clark
CHIEF JUDGE

NANCY B. BAROHN
JUL 18 1991
Attorney-at-Law

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.